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David Schneiderman

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I. INTRODUCTION

Canada may have escaped some of the legitimacy concerns that have arisen around judicial review in the United States, for instance, those that turn on the degree to which original intentions should guide interpretation.[1] There remains, however, a lingering legitimacy concern for the Canadian Supreme Court, common to many high courts in constitutional democracies around the world, namely, how to justify a form of rule where there is deep disagreement over the application of constitutional fundamentals. The solution, suggested in the work of the sociologist Max Weber, is to embrace a model of "formal" legal rationality focused on means-ends analysis. Weber observed that accompanying the decline of magic and gods — associated with modern "disenchantment" — was the rise of bureaucratic rationality. Modern administration conducted along these lines rendered law calculable and predictable, the necessary handmaiden of the spread of both democracy and capitalism.[2] Tendencies toward the bureaucratization of power via this "living machine" were "inescapable".[3] Weber bemoaned, nonetheless, the absence of political

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1 Justice Ian Binnie, "Constitutional Interpretation and Original Intent" (2004) 23 S.C.L.R. (2d) 345. But see Bradley W. Miller, "Beguiled by Metaphors: The 'Living Tree' and Originalist Constitutional Interpretation in Canada" (2009) 22 Can. J.L. and Jur. 331.

2 Max Weber, "Parliament and Government in Germany" [hereinafter "Weber, 'Parliament and Government'"] in Max Weber, ed., *Weber: Political Writings* (Cambridge: Cambridge University Press, 1994) [hereinafter "*Weber: Political Writings*"] 130, at 147-48.

3 *Id.*, at 158.

leadership in Germany to counteract these tendencies.[4] "The future belongs to bureaucratization", he reluctantly declared.[5] The nearly worldwide embrace of proportionality review among apex courts around the world focused on means-ends calculations, I argue, validates in some measure Weber's prediction.[6]

This paper situates the ascendance of proportionality analysis in constitutional law in the context of the difficulty of managing disagreement in secular states.[7] I develop this idea, in the next part, with reference to Charles Taylor's work on secularity and then, in the third part, by turning to Weber's work on the sociology of law. In the last part, I illustrate the argument with reference to a handful of cases drawn from the Supreme Court of Canada and elsewhere. My frame is intended to be more descriptive than normative, though I hope, in the course of the argument, to raise some doubts about the utility of having judges perform this sort of function. The rise of proportionality review, I argue, amounts to a concession on the part of the judiciary that the methodology they deploy differs little from that used by bureaucrats employed by other branches of government.[8]

II. NOT FITTING TOGETHER

Charles Taylor has comprehensively detailed the rise of what he calls the "modern social imaginary". By social imaginary, Taylor is referring

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[4] *Id.*; Max Weber, "The Profession and Vocation of Politics" in *Weber: Political Writings*, *id.*, 309.

[5] Weber, "Parliament and Government", *supra*, note 2, at 156.

[6] On the global embrace of proportionality see, among others cited below, David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004), at 162; Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum. J. Transnat'l L. 72 [hereinafter "Stone Sweet & Mathews"].

[7] References to the "secular" are drawn principally from Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004) [hereinafter "Taylor, *Modern Social Imaginaries*"] and Charles Taylor, *A Secular Age* (Cambridge: Harvard University Press, 2007) [hereinafter "Taylor, *A Secular Age*"]. See also the discussion of secularization in Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard University Press, 1989), c. 18 ("Fractured Horizons"). The term is a modern construct that, Benson maintains, conceals its own "hidden faith": Ian T. Benson, "Notes Toward a (Re)Definition of the Secular" (2000) 33 U.B.C. L. Rev. 519, at 521, 546.

[8] This formulation resembles Kennedy's account of the judicial embrace of balancing by American liberal legalists. See Duncan Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge: Harvard University Press, 1997), at 322 [hereinafter "Kennedy, *Critique*"]; *cf.* Max Rheinstein, "Introduction" [hereinafter "Rheinstein"] in Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1954) xvii, at xlvi. See also Stone Sweet & Matthews, *supra*, note 6, at 87. I have more to say about the relationship between balancing and proportionality below, in text associated with notes 76-87.

to the way in which we, in the occidental West, understand our "fitting together" — what we understand our collective expectations to be and some of the deeper normative premises that ground these expectations.[9] God is no longer part of this normative matrix. In certain milieux, admits the believer Taylor, it is "hard to sustain one's faith".[10] That is because the normative premises of the modern social imaginary rule out the presence of gods.

In the contemporary world, we will have abandoned the idea of a higher being or order that structures our polity. This is what Taylor calls the "great disembedding",[11] resulting in the rejection of hierarchical order in favour of a levelling of possibilities, formulated in the private domain and exhibited by what we today call "identity", in which all possibilities are on the table. This is the "rejection of higher times", observes Taylor, in favour of secular times that are "purely profane".[12] This is a "purely self-sufficient humanism" that accepts no final goals beyond human flourishing, nor allegiance to anything else beyond this flourishing".[13] The social imaginary, then, portrays society as horizontal rather than vertical.[14]

As deep disagreement resides within Taylor's modern imaginary,[15] conceptions of justice compete for supremacy, and so the state resembles what Lefort describes as the "empty space" of sovereignty, periodically

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[9] Taylor, *Modern Social Imaginaries*, *supra*, note 7, at 23; Taylor, *A Secular Age*, *supra*, note 7, at 171. There are, we must assume, many social imaginaries, or variants of modern secularism, even within the Occident. See Talal Assad, "French Secularism and the 'Islamic Veil Affair'" *The Hedgehog Review* (Spring & Summer 2006) 93, at 101 ("Varieties of remembered religious history, of perceived political threat and opportunity, define the sensibilities underpinning secular citizenship and national belonging in the modern state").

[10] Taylor, *A Secular Age*, *supra*, note 7, at 3.

[11] Taylor, *Modern Social Imaginaries*, *supra*, note 7, at 50.

[12] *Id.*, at 90; Taylor, *A Secular Age*, *supra*, note 7, at 209.

[13] Taylor, *A Secular Age*, *id.*, at 18.

[14] *Id.*, at 209, 392; also Lawrence M. Friedman, *The Horizontal Society* (New Haven: Yale University Press, 1999).

[15] The current of deep disagreement occurring within Taylor's modern social imaginary resembles Rawls "reasonable pluralism": John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), at 36 (that a "permanent feature of the public culture of democracy" is a diversity of "reasonable comprehensive religious, philosophical, and moral doctrines"). As Dyzenhaus observes, Rawlsian political liberalism cannot escape the fact of irreducible conflict, "because the values about which it claims consensus and which form the basis of its neutrality are both controversial and partisan". See David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 2009), at 233 [hereinafter "Dyzenhaus"].

occupied by various contingent political projects.[16] Conflict about justice, then, is endemic to the modern democratic state. The state, nevertheless, must be seen to be neutral as between the variety of life projects available to individuals in the modern social imaginary.[17] No "one person or group" can exclusively be associated with the state.[18] The ends to be pursued, in other words, are multifarious and seem to be "increasing without end".[19] It is our communal task to facilitate their realization or at least not get in the way without good reasons. It might be, then, that justice in the modern era is premised on nothing more than generating institutions and procedures for the fair resolution of moral conflict.[20]

What are the normative premises that underlie the modern social imaginary? In the place of the sacred, Taylor proffers human rights, democracy and equality as generating the normative glue that hold together modern polities.[21] Taylor oversimplifies by suggesting there is agreement in the West over what these things mean in practice. Indeed, it is in the course of specifying what equality or democracy means in practice that disagreement stubbornly persists.[22] So there is little in the way of guidance about how these norms are to be realized in contemporary western society. Taylor only points to modern bills of rights as being "the clearest expression of our modern idea of a moral order underlying the political, which the political has to respect".[23] Taylor provides little more in the way of tools for resolving disagreement over the meaning of such norms. We are forced to look elsewhere for further guidance. I will argue that high courts in Canada and elsewhere now look to proportionality analysis to help resolve this crisis of conflict.

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[16] Claude Lefort, "Reversibility: Political Freedom and the Freedom of the Individual" in *Democracy and Political Theory*, translated by David Macey (Minneapolis: University of Minnesota Press, 1988) 165, at 168-69.

[17] The secular state cannot, of course, be neutral, as it has as its overriding object the cultivation of the citizen-subject. See Talal Assad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003).

[18] Charles Taylor, "Why We Need a Radical Redefinition of Secularism" [hereinafter "Taylor, 'Radical Redefinition of Secularism'"] in Eduardo Mendieta & Jonathan VanAntwerpen, eds., *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011) 34, at 47.

[19] Taylor, *A Secular Age*, *supra*, note 7, at 437.

[20] Stuart Hampshire, *Justice Is Conflict* (Princeton: Princeton University Press, 2000), at 52-53.

[21] Taylor, *Modern Social Imaginaries*, *supra*, note 7, at 49.

[22] David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004), at 11.

[23] Taylor, *Modern Social Imaginaries*, *supra*, note 7, at 173; Taylor, *A Secular Age*, *supra*, note 7, at 447.

III. THE RISE OF BUREAUCRATIZED JUSTICE

Max Weber's diagnosis of our "disenchanted" world provides the backdrop for Taylor's modern social imaginary. We now have access, Weber declares, to "technical means and calculations" to solve modern problems. There is no longer a need to have recourse to "magical means" so as "to master or implore the spirits".[24] In this part, I turn to Weber's formulation of modern rationality and bureaucracy, outlined in his posthumously published treatise *Wirtschaft und Gesellschaft* (*Economy and Society*) (1978), in order to identify mechanisms for resolving disagreement that many high courts favour.[25] Weber anticipates by almost a century, I suggest, the turn to proportionality on a nearly global scale.

Weber initially distinguishes between different ideal types of social action, two of which mostly concern us here and which serve as place holders for a discussion of formal and substantive rationality: "instrumentally rational" action and "value rational" action.[26] Value rational action consciously puts into practice convictions generated by ethical, religious or some other value or "cause".[27] Instrumentally rational action, by contrast, is determined by the "expectations" of human behaviour; these expectations are the "means" used "for the attainment of the actor's own rationally pursued and calculated ends".[28] "Action is instrumentally rational when the end, the means, and the secondary results are all rationally taken into account and weighed", declares Weber.[29] The choice between alternative ends might be determined in a value rational manner, Weber admits, which will "always [be] irrational".[30] For this reason, Weber's discussion of instrumental action is focused exclusively on choice of means.[31]

Weber transposes these ideal types in his discussion of the economy, where he contrasts "formal rationality" of economic action (in which

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[24] Max Weber, "Science as a Vocation" in H.H. Gerth & C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946) 129, at 139.

[25] Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. by Gunther Roth & Claus Wittich (Berkeley: University of California Press, 1978) [hereinafter "Weber, *Economy and Society*"].

[26] *Id.*, at 24.

[27] *Id.*, at 25.

[28] *Id.*, at 24.

[29] *Id.*, at 26.

[30] *Id*.

[31] The rational actor can take as a given the choice of ends but may rank them in order of priority according to the principle of "marginal utility" (*id.*).

needs are satisfied based on impersonal technical calculation) with "substantive rationality" (in which the provision of basic needs is shaped by the pursuit of some ultimate value).[32] The formal and the substantive also are foundational to his discussions of law and bureaucracy, where they undergo further refining.[33]

In his discussion of categories of legal thought, Weber distinguishes between: (1) rational and irrational lawmaking and lawfinding; and (2) formal and substantive legality. This gives rise to a grid of four possibilities;[34] formal irrational rule is rule not by intellect but by something analogous to an oracle; substantively irrational rule is the concrete case decided with reference to political, ethical or other non-legal norms, what he derisively called "khadi justice".[35] All formal law is rational law, observes Weber.[36] The degree of formality is determined by the degree to which outcomes are guided by an identifiable system of rules laid down in advance and generalizable.[37] Substantively rational law, by contrast, is distinguished on the basis that values exogenous to the formal legal system determine outcomes: it is influenced "by norms different from those obtained through logical generalization of abstract interpretations of meaning".[38] The key distinction, again, is that between the formally rational and the substantively rational. Without recourse to magic or to spirits to resolve conflicting social ends, there is a high likelihood of disagreement about the results issuing out of substantive legal rational reasoning. In our disenchanted world, it is formal legal rationality that will increasingly define modern legal order, Weber maintains. It reaches its "highest measure" in his ideal typical system of "logically formal" rationality.[39]

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[32] *Id.*, at 85.

[33] Rheinstein, *supra*, note 8, at l.

[34] Anthony T. Kronman, *Max Weber* (London: Edward Arnold, 1983), at 76 [hereinafter "Kronman"]; David M. Trubek, "Max Weber and the Rise of Capitalism" (1972) Wis. L. Rev. 720, at 729 [hereinafter "Trubek"].

[35] Weber, *Economy and Society*, *supra*, note 25, at 656, 976.

[36] *Id*.

[37] Kronman, *supra*, note 34, at 73.

[38] *Id.*, at 76; Weber, *Economy and Society*, *supra*, note 25, at 657.

[39] Weber describes logical formal rationality in this key passage:

> Present-day legal science, at least in those forms which have achieved the highest measure of methodological and logical rationality, i.e. those which have been produced through the legal science of the Pandectist's Civil Law, proceeds from the following five postulates: viz., first, that every concrete legal decision be the "application" of an abstract legal proposition to a concrete "fact situation"; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal

Turning to Weber's discussion of bureaucracy, it is here that formally rational rule is most fully developed and provocatively elucidated.[40] It is provocative because Weber deliberately does not distinguish too carefully between various forms of bureaucratic rule.[41] He subsumes under "bureaucracy" the state's "administrative staff [who] successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order".[42] Weber does not talk very much about judges — the "lawfinders", he calls them, as opposed to the "lawgivers" (legislators).[43] Instead, he prefers to assimilate under his discussion of bureaucratic rationality all forms of state administration, including the administration of justice.[44] Which is not to say that bureaucrats are precisely like judges,[45] only that judges (civilian ones, in particular) bear many of the hallmarks Weber associates with a professionalized bureaucracy. The predominant characteristics of modern bureaucratic rule include: rule by professional administrators, with clear jurisdictional responsibilities, operating under a hierarchical order, managing written documents (files) and following depersonalized general rules previously laid down.[46] The officeholder is appointed to serve a "vocation" for which she is professionally trained (typically requiring some form of higher education) and for which she receives a salary and security of tenure (often for life or with good behaviour).[47]

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logic; third, that the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as it were such a gapless system; fourth, that whatever cannot be "construed" rationally in legal terms is also legally irrelevant; and fifth, that every social action of human beings must always be visualized as either an "application" or "execution" of legal propositions, or as an "infringement" thereof, since the "gaplessness" of the legal system must result in a gapless "legal ordering" of all social conduct" (*id.*, at 657-58).

[40] Reinhard Bendix, *Max Weber: An Intellectual Portrait* (New York: Anchor Books, 1960), at 386.

[41] See also Kennedy, *Critique*, *supra*, note 8, at 368-69; Duncan Kennedy, "The Disenchantment of Logically Formal Legal Rationality or Max Weber's Sociology in the Geneaology of the Contemporary Mode of Western Legal Thought" (2004) 55 Hastings L.J. 1031, at 1040 [hereinafter "Kennedy, 'Disenchantment'"].

[42] Weber, *Economy and Society*", *supra*, note 25, at 54 (emphasis in original).

[43] Isher-Paul Sahni, "Vanished Mediators: On the Residual Status of Judges in Max Weber's 'Sociology of Law'" (2006) 6 J. Classical Sociology 177, at 177.

[44] Kennedy, "Disenchantment", *supra*, note 41, at 1040.

[45] Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" [hereinafter "Kumm"] in George Pavlakos, ed., *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007) 131, at 140, n. 21.

[46] Weber, *Economy and Society*, *supra*, note 25, at 957-59.

[47] *Id.*, at 960*ff.*

What does the "bureaucratization of justice" look like? A "system of rationally debatable 'reasons' stands behind every act of bureaucratic administration, namely", Weber writes, "*either subsumption under norms, or a weighing of ends and means*".[48] By norms, Weber appears to be referring to conventional understandings about law and justice.[49] Weber treats dispute resolution via ends-means calculations, however, as a more evolved and preferred mode of legal rationality. This is because the determination of whether social action is rationally purposeful action is best undertaken with reference to the choice of means that have been adopted rather than having recourse to a ranking of ultimate ends. An assessment of means generates "the highest degree of verifiable certainty", he writes, while a focus on ends "often cannot be understood completely".[50] In the former case, the relation of means and end will be clearly understandable on grounds of experience, "particularly where the choice of means was inevitable".[51] The bureaucratization of legality, insofar as it is intended to promote purposeful rational action, will increasingly look to assessments of means over ends.

Weber does not stipulate, however, that judicial functions are better served under means-ends rationalizations. He does anticipate, however, the predictable objections to his characterization of the "modern judge as an automaton into which legal documents and fees are stuffed at the top in order that it may spill forth the verdict at the bottom, along with reasons, read mechanically from codified paragraphs".[52] Such a conception would angrily be rejected, he admits, even though "a certain approximation of this type would precisely be implied by a consistent bureaucratization of justice".[53] Weber appears to confine these disparaging remarks to German and continental judges. Weber characterizes common law judging based on precedent, however, in not much more favourable terms.[54] Common law judging is an "empirical art" associated with khadi justice, he writes, and therefore "less rational

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[48] *Id.*, at 979 (emphasis added).

[49] Wolfgang Schluchter, *The Rise of Western Rationalism: Max Weber's Developmental History*, translated by Guenther Roth (Berkeley: University of California Press, 1981), at 44 [hereinafter "Schluchter"].

[50] Weber, *Economy and Society*, *supra*, note 25, at 5.

[51] *Id.*, at 18.

[52] *Id.*, at 979.

[53] *Id.* Weber derisively describes the churning of a judicial "slot machine into which one just drops the facts (plus the fee) in order to have it spew out the decision (plus opinion)" (*id.*, at 886).

[54] *Id.*, at c.viii.

and less bureaucratic" because focused on the individual case.[55] A more sympathetic appreciation for the common law method is suggested elsewhere, however.[56] In an essay on "'Roman' and 'Germanic' Law", Weber appears to admire the common law judge's penchant for not "avoid[ing] (in certain cases) the ethical consideration of economic events".[57] By contrast, the "German judge throws the executioner's sword far away and cries out for formal characteristics".[58] This will ensure, he observes, that the "social importance of the administration of civil law will remain relatively modest".[59] Expressions of admiration for the system of English justice suggests, as Ewing argues, that the common law was not "deviant" but sufficiently formal, rational and calculable to facilitate the rise of capitalism, in the sociological sense.[60] Nevertheless, even common law judges, Weber warns, will not resist the spread of bureaucratized justice. He foresees that "the traditional position of the English judge is also likely to be transformed permanently and profoundly" by these same forces.[61]

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[55] *Id.*, at 890, 976; Schluchter, *supra*, note 49, at 90-91. "Quite definitely", Weber writes, "English law-finding is not, like that of the Continent, 'application' of 'legal propositions' logically derived from statutory texts" (in Weber, *Economy and Society*, *supra*, note 25, at 317).

[56] See the important essay by Isher-Paul Sahni, "Max Weber's Sociology of Law" (2009) 9 J. Classical Sociology 209, at 215, which argues that Weber "implicitly extols the English administration of justice".

[57] *Id.*, at 188; Max Weber, "'Roman' and 'Germanic' Law" (1985) 13 Int'l J. Sociology 237 [hereinafter "Weber, '"Roman" and "Germanic" Law'"], at 244. Weber appeared to admire English parliamentary forms of government, enabling rule by an educated political elite, which he sought to replicate, to some degree, in Germany. See Weber, "Parliament and Government", *supra*, note 2; Wolfgang Mommsen, *Max Weber and German Politics, 1890-1920*, translated by Michael S. Steinberg (Chicago: University of Chicago Press, 1984), at 88, 397 [hereinafter "Mommsen"]. On Weber's affinity for English parliamentism and the tension with the need for responsible political leadership (which he labelled "caesarism" [1918]), see Sven Eliaeson, "Constitutional Caesarism: Weber's Politics in their German Context" in Stephen Turner, ed., *The Cambridge Companion to Weber* (Cambridge: Cambridge University Press, 2000) 131.

[58] Weber, "'Roman' and 'Germanic' Law", *supra*, note 57, at 245.

[59] *Id*.

[60] Sally Ewing, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law" (1987) 21 Law & Soc'y Rev. 487, at 499 [hereinafter "Ewing"]. The problem of England is discussed in Trubek, *supra*, note 34, at 746-48.

[61] *Id.*, at 894. This appears to contradict an observation Weber makes elsewhere, that there is no "visible tendency towards a transformation of the English legal system in the direction of the continental under the impetus of the capitalist economy". He notes that where the two systems "compete with one another, as in Canada, the Common Law has come out on top and has overcome the continental alternative rather quickly" (in *id.*, at 318). The contradiction can be resolved: Weber anticipates convergence not by reason of capitalism's inexorable force but due to an increase in the "bureaucratization of formal legislation". See Weber, *Economy and Society*, *supra*, note 25, at 894. Weber's sociological reading of the Canadian experience — the only such reference I have found — seems hard to reconcile with the fact of Canadian bijuralism.

This seeming emptying of modern law of its moral content precipitated indignant attacks from many commentators. Habermas, for instance, accuses Weber of having smoothed the path for the rise of the Third Reich and its principal legal apologist, Carl Schmitt, whom he characterizes as Weber's "legitimate pupil".[62] This is a bit far-fetched.[63] Wolfgang Schluchter offers a more nuanced interpretation of the moral content of Weber's law. He maintains that Weber acknowledged lawmaking and lawfinding as having contemporaneously both procedural and substantive elements, either of which may predominate.[64] Though "separate things", Weber acknowledged in his discussion of formal and substantive rationality in the context of the economy, they "may coincide empirically".[65] Ethical and moral content, in other words, is inevitably internal to legal rationality.[66] As law becomes increasingly generalized and systematized, substantive rationality becomes subsumed under formal rationality. "Legal development isolates, abstracts and hence formalizes both the formal *and* substantive components of law", Schluchter observes.[67] The dichotomy between form and substance is therefore smoothed over in Weber's internal account of law. The dichotomy is pronounced, however, when the legal order is juxtaposed with norms drawn from non-legal fields, that is, when Weber adopts an external point of view.[68]

The best evidence of the substantive element in Weber's account of formal legal rationality is that law and administration has as its purpose securing the needs of business for calculability and predictability.[69] Modern forms of economic organization mandate increasingly formally rational legal systems and so necessitate the spread of bureaucratic organization. "[F]ormal and substantive rationality", Weber admits,

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62 Mommsen, *supra*, note 57, at 410.

63 Ewing, *supra*, note 60, at 504; Dyzenhaus, *supra*, note 15, at 236.

64 Schluchter, *supra*, note 49, at 88.

65 Weber, *Economy and Society*, *supra*, note 25, at 108.

66 Weber famously acknowledged, for instance, the modern indebtedness to "achievements" secured in "the age of the Rights of Man" (*id.*, at 1403); also Weber, "Parliament and Government", *supra*, note 2, at 159. On the difficulty of sustaining a strict separation between the formal and the substantive, and their methodological presuppositions, see Martin Albrow, "Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law" (1975) 2 Brit. J.L. & Soc. 14, at 28 [hereinafter "Albrow"].

67 Schluchter, *supra*, note 49, at 91.

68 *Id*.

69 David Beetham, *Max Weber and the Theory of Modern Politics* (Cambridge: Polity Press, 1985), at 274-76 [hereinafter "Beetham"].

"coincide to a relatively high degree" in market matters.[70] It is "primarily the capitalist market economy which demands that the official business of public administration be discharged precisely, unambiguously, continuously, and with as much speed as possible", Weber maintains.[71] As in the market, bureaucracy necessitates the "discharge of business according to *calculable rules* and 'without regard to persons'".[72] It is not the case, however, that the "propertyless masses" would reap many benefits from formally rational "bourgeois" law.[73] Indeed, legality alone likely is insufficient to beget legitimacy. Weber predicts, for these reasons, the inevitable pressures to "deformalize" law in order to advance the goals of substantive justice. These pressures unavoidably "collide with the formalism and the rule-bound and cool 'matter-of-factness' of bureaucratic administration".[74] This seemingly deformalized account of law — of a "pure and timeless rationality"[75] — is significantly tainted, then, by its substantive content, namely, an ideological vindication of capitalism's relentless pursuit of profit.[76]

IV. IS PROPORTIONALITY ANTIFORMALIST?

Proportionality review is preoccupied with measuring relationships between means and ends for the purpose of determining whether rights limitations are constitutionally permissible. An apex court typically will first address the preliminary question of the "necessity" of the law: in Canadian parlance, is the legislative objective sufficiently pressing and substantial to limit constitutional rights and freedoms? So there is a concern with ends, but courts rarely find objectives to be insufficiently pressing.[77] A series of sub-inquiries, focused on ends-means relations,

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[70] Weber, *Economy and Society*, *supra*, note 25, at 109.

[71] *Id.*, at 974. Weber also maintains that modern mass democracy also engenders bureaucratic tendencies (*id*., at 983).

[72] *Id.*, at 975 (emphasis in original).

[73] *Id.*, at 980.

[74] *Id*.

[75] Albrow, *supra*, note 66, at 15.

[76] Beetham, *supra*, note 69, at 273. Marcuse goes so far as to equate Weber's rationality with profitability, whereby "Western Reason becomes *economic* reason — the drive for ever-renewed profit in the continuous capitalist enterprise" (emphasis in original). See Herbert Marcuse, "Industrialization and Capitalism" I/30 New Left Review (March/April 1965) 3, at 5, and discussion in Jürgen Habermas, "Technology and Science as 'Ideology'" in Jürgen Habermas, *Toward a Rational Society*, translated by Jeremy J Shapiro (London: Heinemann, 1971) 81.

[77] Aharon Barak, "Proportionate Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369, at 371 [hereinafter "Barak, "Proportionate Effect"].

comprise the proportionality inquiry. First, are the means adopted suitable for advancing the objective ("rational connection"); second, do the means infringe on those rights as little as necessary ("least restrictive means"); and, third, is the benefit gained by the legislative scheme proportionate to the deleterious effect on rights ("proportionate effect")? Why, we might ask, is this not antiformalist — the sort of substantive reasoning that is in tension with the "cool matter of factness" of formal legal reasoning? Duncan Kennedy makes precisely this claim, analogizing U.S.-style balancing to a mere technical "means of pacifying conflicts of interest".[78] With no real coherence — it certainly is not a closed and gapless system — a Weberian "disenchantment" has set in giving rise to a new ideal type of "policy argument", akin to a "formalized substantive rationality", maintains Kennedy.[79] Policy analysis is committed to "balancing conflicting policies, with an eye to consequences, in a context in which rules represent no more than the means to implement the resulting compromise".[80] Elsewhere, Kennedy likens U.S.-style "balancing" to proportionality review in European public law. They seem to be "identical", he surmises, and suggests that the origins of German proportionality review are traceable to the influence of U.S. balancing that arose in response to the formalism of classical legal thought.[81]

At the high level of abstraction that Kennedy describes this "single evolving template", there is an instructive overlap between the two approaches.[82] From the perspective (or "subjective belief"[83]) of the relevant actors (judges, lawyers, even law students), however, there may be little overlap. Proportionality, for these actors, does not exhibit features of U.S.-style judicial policymaking as described by Kennedy: a "last resort", when "logical methods have 'run out'", with no consensus as to

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[78] Weber, *Economy and Society*, *supra*, note 25, at 894; Kennedy, "Disenchantment", *supra*, note 41; Duncan Kennedy, "A Transnational Genealogy of Proportionality in Private Law" [hereinafter "Kennedy, 'A Transnational Genealogy'"] in Roger Brownswood *et al.*, eds., *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 185.

[79] Kennedy, "Disenchantment", *id.*, at 1071.

[80] *Id.*, at 1078.

[81] Kennedy, "A Transnational Genealogy", *supra*, note 78, at 217-20. Kennedy writes: "For Hand, as for Holmes and Hohfeld, the move to balancing was initially part of the liberal critical project, because he saw overt judicial balancing as formal acknowledgment that judges decide questions of policy without any methodology that distinguishes them from legislators" (Kennedy, *Critique*, *supra*, note 8, at 322). This is the helpful observation with which I began this essay (see text associated with note 8, *supra*).

[82] Kennedy, "A Transnational Genealogy", *supra*, note 78, at 218.

[83] Weber, *Economy and Society*, *supra*, note 25, at 894.

when the judiciary should have recourse to its methods.[84] Instead, it is understood as a formalistic template, which applies in all constitutional cases and which is "less free" — more "controlled" and "predictable" a technique — than balancing. [85]

Rather than having a U.S. genealogy, the origins of German proportionality doctrine are traceable back to Prussian administrative courts of the late 19th century that developed the method in order to determine whether exercises of state police powers were excessive.[86] The methodology, Cohen-Ilaya and Porat explain, "remained essentially formalistic": what guided administrative law court rulings in this period was a "more formal means-ends analysis" rather than a "more substantive (balancing)" exercise.[87] Proportionality review, according to this historical account, "was completely neutral and 'entirely independent of any ideology'".[88] In the next part, I argue that modern approaches to proportionality (both judicial and scholarly) are entirely consistent with this formalistic, rationalizing tendency. Indeed, one explanation for the rapid, worldwide embrace of proportionality by high courts is that it assists judges in maintaining a semblance of neutrality at a time when there is much disagreement over the meaning of constitutional essentials.

This is not to say that proportionality's proponents have succeeded in emptying their preferred method of its substantive content. To the contrary, there is much going on under the guise of proportionality review that aims to pass for indifference as to ends and as to the correlation between means and ends. In which case, it may be that modern approaches look more like exercises in U.S.-style balancing. This is apparent in Weber's analysis of the relationship between law and capitalism.[89] Weber even admits that, "as far as facts are concerned", the

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[84] *Id.*, at 189-91.

[85] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 U.T.L.J. 383, at 397 [hereinafter "Grimm"].

[86] Moshe Cohen-Eliya & Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" (2010) 8 Int'l J. Con. L. 263, at 272-73 [hereinafter "Cohen-Eliya & Porat"]; Kenneth F. Ledford, "Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court (1876-1914)" (2004) 37 Central European Hist. 203 [hereinafter "Ledford"]; Stone Sweet & Mathews, *supra*, note 6, at 98-101.

[87] Cohen-Eliya & Porat, *id.*, at 274. The "free law" movement, which eschewed formalism in favour of outright balancing of interests, had no influence on these developments (see *id.*, at 275). On the radicalism of the *freirechtslehre* movement, see discussion in Wolfgang Friedmann, *Legal Theory*, 3d ed. (London: Stevens & Sons), at 244-46.

[88] Cohen-Eliya & Porat, *supra*, note 86, at 572.

[89] See text associated with notes 69-76, *supra*.

law is not a convincingly "gapless" system.[90] With Kennedy, we should no longer be under the illusion that the "system" is neutral and "in some sense produces the norms that decide cases".[91] Instead, we should be attentive to the ways in which judicial techniques, particularly those with successful global take-up, both bracket certain inquiries and serve particular interests. Elsewhere I have characterized the process, following Bourdieu, as a site of struggle over the ability to name one's reality as common sense — a power to ordain that which is obvious or self-evident.[92] There remains the hope among its proponents, nonetheless, that proportionality will have a "disciplining and rationalizing effect" such as to render its results less arbitrary and more predictable.[93]

V. PROPORTIONALITY'S FORMALITIES APPLIED

It is surprising that the contemporary literature on the rise of proportionality review, within Canada and globally, mostly has missed this connection to Weber.[94] Many of the critiques of means-ends rationality review were anticipated in debates with Weber, for instance, that proportionality review elides the complexity of rights and the necessity for moral evaluation in determining the content and scope of rights.[95] Defenders of proportionality try to appease their critics by rejecting the claim that proportionality is devoid of any moral reasoning (as does

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[90] Max Weber, "On Legal Theory and Sociology" in Arthur Jacobson & Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000) 50, at 52.

[91] Kennedy, "Disenchantment", *supra*, note 41, at 1068.

[92] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings L.J. 805; David Schneiderman, "Common Sense and the Charter" (2009) 45 S.C.L.R. (2d) 1, at 5 [hereinafter "Schneiderman, 'Common Sense'"].

[93] Grimm, *supra*, note 85, at 397. Barak nevertheless admits that there is an unavoidable element of judicial discretion in judicial "balancing" (his synonym for proportionality review). See Barak, "Proportionate Effect", *supra*, note 77 and Aharon Barak, *Proportionality, Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2011) [hereinafter Barak, *Proportionality*], at 485-88.

[94] I have found only a handful of such references in the English-language literature, largely subsidiary to the main argument, in Francisco J. Urbina, "A Critique of Proportionality" (2012) 57 Am. J. Juris. 49, at 77-79; Cohen-Eliya & Porat, *supra*, note 86, at 274; Jacco Bomhoff, "Balancing the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law" (2008) 31 Hastings Int'l & Com. L. Rev. 555, at 575.

[95] Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7 Int'l J. Con. L. 468, at 475; Gregoire C.N. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009).

Schluchter).[96] At the same time, defenders of proportionality applaud its structure of reasoning as it generates "more rationality towards the whole process" of weighing rights.[97] Indeed, the literature is replete with claims about improving the "rationality" of constitutional decisionmaking (and this without reference to "rational connection" or "suitability" criteria associated with proportionality review).

More striking is the prevalence of mathematical or mechanical imagery,[98] which for Weber was the mark of modern rational thought. According to Robert Alexy's influential account, generalizing from the work of the German Constitutional Court, the greater the intensity of the infringement, the greater must be satisfaction of some countervailing constitutional principle.[99] This is reduced to a "law of balancing"[100] and the generation of a mathematical model Alexy calls the "weight formula".[101] Proportionality's defenders, however, deny that constitutional rights problems will always be answered by having recourse to the logic of numbers. Instead, things such as Alexy's "weight formula" help make the process more "rational". Admitting that proportionality aspires to have the precision of mathematics, the "model [still] works fine without any use of numbers", admit Klatt and Meister.[102]

We can surmise that judges are aware of the benefits of having recourse to proportionality's forms of argument. Indeed, it is remarkable how widely the method has been embraced by apex courts in constitutional democracies around the world,[103] even popping up occasionally in the U.S. Supreme Court, the principal outlier in the field.[104]

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[96] See discussion in text associated with notes 64-68, *supra*. Kumm, *supra*, note 45; Matthias Klatt & Moritz Meister, "Proportionality — A Benefit to Human Rights? Remarks on the ICON Controversy" (2012) 10 Int'l J. Con. L. 687 [hereinafter "Klatt & Meister"].

[97] Klatt & Meister, *id.*, at 700.

[98] *Id.*, at 699.

[99] Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002), at 47-48. Alexy's formulation is dependent upon a distinction between rules and principles.

[100] Robert Alexy, "The Construction of Constitutional Rights" (2010) 4(1) L. & Ethics Human Rights 21, at 28.

[101] Robert Alexy, "The Weight Formula" in Jerzy Stelmach, Bartosz Brozek & Wojciech Zaluski, eds., *Studies in the Philosophy of Law III: Frontiers of the Economic Analysis of Law* (Krakow: Jagiel-Ionian University Press, 2007) 9.

[102] Klatt & Meister, *supra*, note 96, at 700.

[103] Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

[104] Stephen Gardbaum, "The Myth and Reality of American Constitutional Exceptionalism" (2008) 107 Mich. L. Rev. 391; Jud Matthews & Alec Stone Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing" (2011) 60 Emory L.J. 797; Moshe Cohen-Eliya & Iddo

Proportionality review, judges must assume, looks more precise, objective and therefore legitimate than is the second-guessing of legislative ends. Yet, in so doing, judges replicate roles performed by lawmakers and their functionaries, tailoring laws without having to engage in too many value judgments (which are otherwise suppressed).

The Canadian evidence in this regard is incontrovertible. We have seen the Supreme Court of Canada pretty much abandon the first two limbs of its inquiry ("pressing and substantial objective" and "rational connection") in order to speed ahead to the seemingly more scientific "less restrictive means" inquiry.[105] Monahan and Petter astutely describe this as the "democracy-perfecting" stage of the Court's analysis.[106] No second-guessing here, only an opportunity to sit in the shoes of the legislators and, if need be, discipline them into being better tailors. This helps to explain the Courts' indignant response to the government of Canada when it shielded, under the cloak of cabinet confidentiality, evidence of less restrictive alternatives in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[107] The Court would not condone being denied the material with which to perform its democracy-perfecting functions.[108]

Having recourse to a couple of other Supreme Court of Canada cases helps to sustain the claim that the judicial role in proportionality review is a form of bureaucratic reasoning anticipated by Weber. *R. v. Edwards Books and Art Ltd.*[109] provides an early example where the Court sought to weigh competing interests pitted against each other, namely, those of sabbatarians and retail sector workers. In the context of determining whether it was less impairing of religious freedom to allow a full Sunday exemption for sabbatarians, Dickson C.J.C. carefully calibrated the interests of each and concluded that a full exemption (under the Court's least restrictive means analysis) would "entail a substantial disruption of the quality of the pause day".[110] Instead, Dickson C.J.C. preferred to maximize the benefit of a common pause day to Ontario workers by deferring to the legislative solution of limiting retail space to 5,000 square

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Porat, "The Hidden Foreign Law Debate in *Heller*: Proportionality Approach in American Constitutional Law" (2009) 46 San Diego L. Rev. 367.

[105] Schneiderman, "Common Sense", *supra*, note 92, at 8.

[106] Patrick J. Monahan & Andrew Petter, "Developments in Constitutional Law: The 1985-86 Term" (1987) 9 S.C.L.R. 69, at 105.

[107] [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at 310 (S.C.C.).

[108] David Schneiderman, "Consumer Interests and Commercial Speech: A Comment on *RJR-MacDonald v Canada (AG)*" (1996) U.B.C. L. Rev. 165.

[109] [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.).

[110] *Id.*, at 777.

feet and to no more than seven employees. Deferring to policy choices already made, the Court conceded it could do no better than the legislature in tailoring means to ends.

A rigid bureaucratic rationality underlay McLachlin C.J.C.'s majority opinion in *Hutterian Brethren of Wilson Colony v. Alberta*.[111] Deferring to Alberta's stated policy objective for having photos taken for driver's licences — in order to produce a digital data bank of all drivers so as to reduce identity theft in the province (not for the purpose of improving road safety) — McLachlin C.J.C. single-mindedly refused to deviate from the government's aim of having a one-to-one correspondence between drivers and photos. Anything less, she complained, would lead to "some increase in risk and impairment of the government goal".[112] Any alternative scheme would "significantly compromise"[113] and would not "substantially satisfy" that goal.[114] This astonishing level of deference to legislative objectives and its optimization at any cost, though defensible under a version of proportionality analysis, underscores the Court's concession of policy grounds to lawmakers. The Court's rigid adherence to the logic of its proportionality analysis is significantly undermined by its abandonment at the proportionate effects stage and by the embrace of a new standard of "meaningful choice".[115] Looking much less like typical means-ends analysis in this fourth and final stage, renders the ruling aberrant. The joint dissent of LeBel and Fish JJ. (in addition to the dissent of Abella J.) appears to be more honest, by contrast. The search under section 1, they write, is to "reach a better balance" rather than considering alternatives based "on a standard of maximal consistency with the stated objective".[116] The dissenting justices seem to admit that there is more going on than the majority admits — that the logic of proportionality gives rise to contestable value judgments.

This approach to balancing, in which ends and means are carefully calibrated so as to maximize rights, can be found in the work of high courts in other jurisdictions: it is epitomized by President Aharon Barak of the Supreme Court of Israel ruling in *Beit Sourik*.[117] The case

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111 [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 [hereinafter "*Hutterian Brethren*"].

112 *Id.*, at para. 59.

113 *Id.*, at paras. 60, 104.

114 *Id.*, at para. 60.

115 *Id.*, at paras. 88, 94, 95, 96, 98. The majority describes the inquiry as being one of whether religious affiants "have been deprived of a meaningful choice to follow or not to follow the edicts of their religion" (*id.*, at para. 98). The "absence of a meaningful choice" is fatal (*id.*, at para. 94.)

116 *Id.*, at para. 195.

117 *Beit Sourik Village Council v. Government of Israel* (2004) HCJ 2056/04 (June 30), online: <http://elyon1.court.gov.il/Files_ENG/04/560/020/A28/04020560.A28.pdf>.

concerned a 40-kilometre stretch of the wall separating Israel from the West Bank. Palestinian villagers sought to divert construction of the "fence" so as not to be separated from their agricultural lands. The petitioners claimed that fundamental rights, including those to property, freedom of movement, occupation and religion, were infringed. Though authority to erect the fence was sanctioned by the Court, President Barak concluded (in the last branch of proportionality, "in the narrow sense") that the fence's route could be adjusted. Though resulting in a minutely diminished security advantage, adjustment would result in a correspondingly significant increase in the satisfaction of the petitioners' basic rights.[118] Barak's conclusion resonated in a discourse of quantifiable harms and benefits:

> The gap between the security provided by the military commander's approach and the security provided by the alternate route is minute, as compared to the large difference between a fence that separates the local inhabitants from their lands, and a fence which does not separate the two (or which creates a separation which is smaller and possible to live with).[119]

The mathematical merit of proportionality has not been lost on judges in many high courts around the world. It also has not been lost on agents promoting new transnational legal institutions that perform adjudicative functions. In the field of international investment law, for instance, investment tribunals have been wading into controversial policy domains, limiting state capacity in order to protect the interests of foreign investors.[120] Scholars in the field have responded by advocating the adoption of proportionality as a means of resolving the legitimacy problems that continue to plague the system. "Intense concerns about legitimacy in the system", it has been said, "should drive a rapid adoption of proportionality analysis as a standard technique".[121] Anything less would be "suicidal".[122]

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[118] *Id.*, at para. 61.

[119] *Id.*; Barak, "Proportionality", *supra*, note 93, at 354.

[120] David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Basingstoke: Palgrave Macmillan, 2013).

[121] Benedict Kingsbury & Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law" in Benedict Kingsbury *et al.*, eds., *El Nuevo Derecho Administrativo Global en América Latina: Desafíos para las Inversiones Extranjeras, La Regulación Nacional y el Financiamiento para el Desarrollo* (RPA, 2009), online: <www.iilj.org/GAL/documents/GALBAbook.pdf>.

[122] Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier" (2010) 4(1) L. & Ethics Human Rights 47, at 75.

This is not to say, returning to the Canadian example, that the Supreme Court of Canada is focused single-mindedly on ends-means rationality review. There is much else going on, as LeBel and Fish JJ. Intimate in *Hutterian Brethren*,[123] including the valuing of certain activities and the devaluing of others, for example, in the Court's freedom of expression cases[124] — value judgments in these sorts of cases being "inevitable".[125] There is, in other words, much moralizing going on, although the Court typically does not wish to emphasize this aspect of its work.[126] It would prefer to be seen to be focusing on more objective criteria that are susceptible to empirical evaluation — a function that enlightened bureaucratic reason is well equipped to perform.

VI. CONCLUSION: NOBODY DOES IT BETTER?

The judicial embrace of proportionality analysis on a worldwide scale raises the question of whether the judicial branch is best suited to perform functions associated with bureaucratized justice. Recall that Weber subsumes under the umbrella of bureaucratic reasoning the judicial function: the bureaucratization of justice does not carefully distinguish between judicial reasoning and that of other functionaries. The embrace of judicial review focused almost exclusively on ends-means analysis, I have argued, amounts to an admission on the part of the judicial branch that they have given up serving functions other than bureaucratic ones.

Questions arise not only about suitability, but also about institutional capacity. With a judicial focus squarely on appropriate means, the question of proof perennially arises. However adequate the evidentiary record, it typically points in different directions.[127] With what techniques should the judiciary resolve evidentiary disagreement? Having to second-guess policy decisions "under conditions of factual uncertainty", courts encounter an "enormous institutional dilemma"

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[123] *Hutterian Brethren*, *supra*, note 111.

[124] *Whatcott v. Saskatchewan (Human Rights Commission)*, [2013] S.C.C. No. 11, 2013 SCC 11 (S.C.C.).

[125] Kennedy, "Disenchantment", *supra*, note 41, at 1074.

[126] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, MA: The MIT Press, 1996), at 259-60.

[127] Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere But Here?" (2012) 22 Duke J. Comp. & Int'l L. 291, at 299.

concerning questions of deference.[128] What comparative advantage does the judicial branch bring to the performance of these functions? Might some other, perhaps not yet envisaged, institution be better suited to do this sort of work? Late 19th-century Prussian administrative law courts, credited with having originated proportionality doctrine on the Continent, for instance, were composed at various levels of a mix of jurists, bureaucrats and laypersons.[129]

I cannot provide fulsome answers to these questions by way of a conclusion. Instead, I propose we return to Weber's suggestive account of the rise of formal legal rationality. Weber associates its ascendance with the expansion of professional legal training in university settings. The fourth and final stage of legal development, Weber writes, follows upon the "systematic elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical matter".[130] It is legal education, in either its continental or common law variants, which plays a key role in generating "a dependable and professional group of administrators".[131] "[G]eneral economic and social conditions" only indirectly influence the increasing rationalization of law, Weber maintains. Instead, it is the "prevailing type of legal education, i.e., the mode of training of the practitioners of the law, [which] has been more important than any other factor".[132]

Legal education may be performing similar functions today. Even though the judicial arm may not be best suited to undertake the kind of policy second-guessing expected under proportionality review, the institutions of legal education are generating the conditions for more expert, and more formally rational, application of its techniques. To the

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[128] Sujit Choudhry, "What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 S.C.L.R. (2d) 501, at 503; also Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge: Harvard University Press, 2006).

[129] See discussion in the text associated with notes 86-88. This followed from Rudolf Gneist's proposal (see Ledford, *supra*, note 86, at 211). In practice, however, this resulted in a "lawyer's monopoly" at the highest level, the Supreme Administrative Law Court, as "both administrators and judges received the same training and acculturation at the universities" (Ledford, *supra*, note 86, at 223). Weber must have had these courts in mind when he describes a "mixed bench" composed of judges and laypersons "which experience has shown to be a system in which the laymen's influence is inferior to that of experts" (*Economy and Society*, *supra*, note 25, at 893).

[130] Weber, *Economy and Society*, *supra*, note 25, at 882.

[131] Richard Swedberg, *Max Weber and the Idea of Economic Sociology* (Princeton: Princeton University Press, 1998), at 105.

[132] Weber, *Economy and Society*, *supra*, note 25, at 776. Also see the helpful discussion in Ewing, *supra*, note 60, at 494.

extent that law schools make proportionality review central to their teaching (in constitutional, European, and international trade and investment law, for instance), then we can assume that lawyers making argument and justices deciding cases will be better equipped to do so. Legal education focused on means-ends rationality review, in other words, will aid in the better performance of techniques associated with this judicial function. Which is not to say that another more specialized branch may not do better. But given the allure of seemingly neutral methods, the judicial branch is likely to jealously guard the continuing performance of this function. In our disenchanted times, it is, after all, one of the few remaining things they claim to do well.